

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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:
In the Matter of Advance Notice of Proposed: CAN-SPAM Act Rulemaking,
Rulemaking and Request for Comments :
Relating to the Definitions, Implementation : Project No. R411008
and Reporting Requirements Under the :
CAN-Spam Act :
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COMMENTS OF PROMOTION MARKETING ASSOCIATION

I. Introduction

The Promotion Marketing Association (“PMA”), on behalf of its members, is pleased to submit these comments in response to the Federal Trade Commission’s notice of proposed rule making (“NPRM”) relating to certain definitions and reporting requirements under the CAN-SPAM Act. 70 F.R. 25426 (May 2, 2005). PMA has also endorsed a letter signed by a coalition of trade associations that share common concerns regarding the issues under current consideration.

The PMA has been the leading non-profit association representing the promotion marketing industry since 1911. PMA has approximately 650 members representing diverse aspects of the industry, including Fortune 500 consumer goods and services companies, advertising and promotion agencies, and university faculty who educate about promotional activities as part of a business curriculum. The PMA's mission is to encourage the highest standards of excellence in promotion marketing. The objectives of the PMA are to educate its members on the laws that govern promotions and to act as a resource to state legislatures, state attorneys general, and federal regulatory agencies in drafting appropriate and focused legislation and rules to combat deceptive marketing and promotion practices.

Many PMA members currently follow an “integrated marketing” approach, which involves the use of a combination of different media and marketing tools to execute an overall marketing plan. E-tailing and other forms of marketing play an increasingly important role in such integrated marketing programs for many such members. The PMA has a keen interest in ensuring both that e-mail marketing remains free of abuses and that this channel not become subject to unnecessarily burdensome regulation.

In comments to earlier NPRM’s, PMA fully endorsed the Commission’s efforts to eliminate unwanted, deceptive and fraudulent commercial e-mails. We confirm our support herein and concur in the Commission’s efforts to address certain issues raised by marketers during earlier comment periods, particularly those that relate to the problems associated with multiple advertiser messages. However, we urge that the Commission clarify its most recent proposal regarding the test for ascertaining the “sender” of multiple advertiser messages. In addition we request (i) that it clarify that “Forward-to-a-Friend: e-mails are a legitimate means of facilitating an exchange of commercial \ non-commercial information, which as a “routine conveyance” falls outside the scope of the Act; (ii) that it reconsider its proposed reduction of the time period to honor opt-outs from ten (10) to three (3) days; and (iii) that it re-evaluate the proposal to preclude a sender from requiring the e-mail recipient to provide anything more than his or her e-mail address to effectuate an opt-out request. We treat these matters in turn.

II. Comments

A. “Forward-to-a-Friend” E-mail

- 1. The Commission should clarify in its Statement of Basis and Purpose that “Forward-to-a-Friend” e-mails are a legitimate means of facilitating an exchange of commercial and non-commercial information.**

“Forward-to-a-Friend” e-mails are initiated by a sender and directed to a friend or contact of the sender. There are many legitimate marketing purposes that are furthered by the use of “forward-to-a-friend” mechanisms. For example, many marketers will feature current advertisements for their products and services on their Web sites.¹ Because these advertisements can have significant entertainment value, visitors may want to use e-mail technology to forward the advertisement to a friend. Generally, “forward-to-a-friend” mechanisms do not involve the collection of e-mail addresses of any recipient of the forwarded e-mail unless and until the recipient takes a further step and affirmatively provides his or her personal information. The Web site owner benefits from the use of the “forward-to-a-friend” mechanism because the recipient often receives the information in a form that contains brand identifiers or other marketing information along with the information forwarded by the sender. The Web site owner’s marketing message is thus disseminated to third parties whom the Web site owner does not know. Consumers benefit from the use of “forward-to-a-friend” mechanisms as well. Such mechanisms provide consumers a quick and easy means of sharing information of interest to friends. Instead of going through the trouble of e-mailing a link to the marketer’s website or verbally providing the address to friends, consumers can simply enter e-mail addresses into the “forward-to-a-friend” mechanism to have a message sent automatically to friends.

“Forward-to-a-friend” campaigns are akin to customary “word-of-mouth” promotion and marketing formats that are ubiquitous in the U.S. market. Countless businesses, from producers of cosmetic products to cable service providers, rely heavily on “word-of-mouth” advertising. Such advertising has become an integral, virtually indispensable part of U.S. commerce. The “forward-to-a-friend” format is the electronic equivalent of traditional “word-of-mouth”

¹ See, e.g., <http://www.spicyparis.com> sponsored by Hardee’s Restaurants.

advertising, and is equally legitimate and effective as a means of facilitating the communication of commercial and non-commercial information.

2. The Commission should clarify in its Statement of Basis and Purpose that a marketer’s provision of an incentive to use a “forward-to-a-friend” e-mail mechanism is not necessarily inconsistent with the concept of “routine conveyance.”

The plain language of the CAN-SPAM Act makes clear that a “forward-to-a-friend” e-mail can fall within the definition of a “routine conveyance” even where the a consumer is offered an incentive to use the “forward-to-a-friend” mechanism. Routine conveyances are not subject to the requirements and limitations under the Act. 15 USC § 7701(9) (2000). The CAN-SPAM Act defines “routine conveyance” as “the transmission, routing, relaying, handling, or storing, through an automatic technical process, of an electronic mail message for which another person has identified the recipients or provided the recipient addresses.” *Id.* at § 7701(15). The definition of routine conveyance is clear, and in no way does it indicate that a transmission is not a routine conveyance where an incentive is involved. If an e-mail is transmitted through an “automatic technical process” to addresses that a third party has provided, the transmission is a routine conveyance and, therefore, outside the scope of the Act. This is true notwithstanding the involvement of an inducement. Nothing in the language of the Act makes it necessary for a transmission to be free of any incentive to fall under the routine conveyance exemption.

The inducement may be in the form of free e-mail service or a free entry into a sweepstakes. Whatever the incentive to use a “forward-to-a-friend” mechanism, the resulting e-mail transmission constitutes a routine conveyance as long as the transmission occurs through an automatic technical process and a third party provides or identifies the e-mail recipients. In drafting the “routine conveyance” language, Congress clearly intended to carve out an exception for the sort of e-mail transmissions that are carried out through ordinary “forward-to-a-friend”

mechanisms. Therefore, the FTC should clarify in its Statement of Basis and Purpose that offering consumers an inducement to use a “forward-to-a-friend” mechanism does not necessarily bring the resultant e-mail transmission within the ambit of the CAN-SPAM Act.

Furthermore, if the typical “forward-to-a-friend” mechanisms were deemed to be subject to the opt-out and other requirements under the CAN-SPAM Act, marketers who had not been collecting personal information about the recipients of forwarded e-mail would have to begin to collect that information in order to comply with the Act. Because typical “forward-to-a-friend” e-mail mechanisms do not create lists of names of recipients that would be useful for subsequent e-mail solicitation, it is unwise to force those marketers who wish to continue to employ the referral marketing to collect personal information just so they can comply with the law. This counter-intuitive incentive would have the effect of increasing the amount of unsolicited e-mail (because marketers would now have an incentive to use the list for marketing purposes – in compliance with the Act), and could increase the risk of misuse of personal information. In effect, the Commission would be directing marketers to collect more personal information than they need for their legitimate marketing purposes just so that they can permit recipients to opt out of receiving those unsolicited subsequent e-mails. The Commission should not encourage the creation of e-mail lists by marketers.

By including the “routine conveyance” exception, Congress clearly intended to exempt those whose involvement in the dissemination of commercial e-mail is limited to creating the facility for dissemination and who do not participate in the coordination and development of recipient lists. Moreover, providing inducements or other incentives to visitors to a Web site to forward information using a marketer’s “forward-to-a-friend” mechanism does not necessarily constitute such coordination or development of recipient lists. An inducement such as an entry

into a sweepstakes or points redeemable in a loyalty program may well encourage participants on a Web site to use a “forward-to-a-friend” mechanism. As long as the “forward-to-a-friend” mechanism is an “automatic technical process” and the operator of the mechanism is not identifying or selecting the recipients, the CAN-SPAM Act requirements should not apply.

By urging the Commission to recognize the legitimacy of “forward-to-a-friend” mechanisms and the application of the “routine conveyance” exemption in this context, PMA is not removing all of the Act’s teeth. A marketer who offers a “forward-to-a-friend” mechanism for the purpose of gathering recipient e-mail addresses for the purpose of future marketing is subject to the Act. That marketer would be involved with the coordination and development of e-mail lists (regardless of whether there was an inducement provided as part of the “forward-to-a-friend” mechanism) and would thus fall outside of the routine conveyance exemption.

In addition, the “Forward-to-a-Friend” mechanism provides: (1) an opportunity for individuals who would not otherwise have access to information about a promotion and who can therefore make an informed decision of whether or not to participate in the promotion and (2) what for the senders is a much more cost efficient way of doing business. The alternative for the senders may well be replacing this altogether legitimate and time honored mechanism with much more costly ways of doing business.

B. The Commission should clarify the test for determining the sender of a multiple e-mail message.

The Commission has adopted the well reasoned position that the advertisers in a joint e-mail message should be permitted to decide which of the several entities will be deemed the sender for the purpose of compliance with the requirements of the CAN-SPAM Act. The Commission has clearly recognized that multiple sender designations would create serious compliance problems and would also place at risk the personal information provided by the

recipient whose data would be subject to multiple transfers among the several marketers in the message. PMA shares in the Commission's views, but believes it should further clarify the single sender standard for multiple advertiser commercial e-mail messages and provide direction as to which entity actually "controls the content" of a such a joint e-mail message.

Each advertiser in a multiple advertiser e-mail message typically controls that portion of the message that relates specifically to its particular products or services. And, in many instances, marketers which contribute to joint advertising messages will review and approve each others ads to ensure that the messages are truthful and non-deceptive as such terms are applied in the advertising laws. If the Commission were to treat these functions as "control" within the meaning of the Act, those who create their own advertising content or review and approve the content of others, could be deemed a sender for CAN-SPAM purposes and be subject to the disclosure requirements of the law.

In our view, the more appropriate test is who controls the content of the ad beyond the language relating to its own products or services. Factors for this assessment could include (1) which marketer controls the overall content and layout for the e-mail message as a whole, and (2) which controls or determines whether the message will actually be sent.

C. The period for honoring opt-out requests should remain at ten (10) days.

PMA recommends that the Commission reject a three day opt-out approach and retain the ten (10) day period for honoring opt-out requests.

Since the passage of the CAN-SPAM Act, marketers have implemented systems and procedures designed to meet the current ten day compliance period. A three fold reduction in time would unduly burden marketers in general and would particularly penalize small and other companies

with limited resources which have already invested significant time and money in systems designed to meet the current grace period for compliance and radically increase the costs of compliance.

Thus, for example we are familiar with situations in which companies use different e-mail service providers to handle different sectors of their respective business. Each of these vendors receives opt-out requests in response to promotions they send out on behalf of the promotion company (we will call it the “X” Co. in this response). Opt-out requests sent directly to any one of X’s vendors may be processed very quickly and may not present problems in complying with the 3-day window. However, all opt-out requests received by one vendor must, perforce be disseminated to, and honored by, all the other vendors. This is the nub of the problem under a reduced 3-day timeframe.

It is common experience that opt-out information for all opt-outs is stored in one central database. Each week the X Co. obtains all opt-outs received by each vendor during the previous week. In addition to the files provided by each of its third-party e-mail service providers, X also receives opt-outs sent to each of its web sites. All these opt-out files are then properly formatted and brought into a centralized opt-out database. The X Co. then updates its opt-out files and e-mails them to each vendor. Such vendors then scrub these new opt-out files against the mailing lists to ensure that all those who have opted out are suppressed from future promotions.

This process results in opt-out requests being responded to anywhere from 1 to 6 business days. In order to effectuate compliance with a 3-business-day standard, the X Co. would need to update and scrub all its opt-out files every other day, not just once per week, resulting in a single FTE devoted exclusively to this process. The cost of this compliance would be quite significant. Increasing the frequency of these updates constitutes a huge burden and is not practical. If the

FTC adopts a 3-business-day standard companies like X would have to consider alternative means of dealing with opt-out requests. This project would be most costly in money and in people's time.

Moreover, the consumer benefit necessary to justify the substantial change would not necessarily follow from the reduced period of compliance. While some commentators have expressed the idea that ten days provides marketers with ample time to "mail bomb" consumers, nothing of record suggests that this practice has been prevalent during the eighteen months during which the Act has been in effect. In any event, a three day period would not necessarily preclude such activity if an aggressive marketer were so inclined.

Finally, PMA respectfully submits, contrary to the Commission's view, that a reduced compliance period will not "better protect the privacy interests of the e-mail recipients." NPRM, 70 F.R. 25443. If anything, a reduced period will likely heighten the possibility for error as marketers deal with increased data over a shorter length of time.

D. Marketers should be permitted to require reasonable data from recipients to verify the authenticity of their opt-out requests.

Under the current proposal marketers cannot as a condition of honoring opt-out requests charge a service fee or require a recipient to provide personal identifiable information beyond his/her e-mail address. PMA fully supports the ban on fees but believes that marketers should be permitted to require more than an e-mail address in connection with its opt-out procedures.

Over the past several years, identity theft has become commonplace and online security breaches have been regularly reported. Marketers are mindful of these problems and should, in our view, be given latitude to request such data as necessary to ensure that those who have opted out are the same as those to whom the e-mail addresses have been assigned. Marketers should be

free to request, for example, a user name and password if the initiator of the opt-out request registered in that fashion at the marketers site. Clearly, this type of non-burdensome request would tighten security and provide additional privacy protection for the consumer.

Finally, we respectfully submit that the totality of the opt-out procedure should not be limited to the sending of a single e-mail request or a one time visitation to opt out a single website page. Marketers should, at a minimum, have the right to send a single confirming e-mail to verify the consumer's identity prior to honoring his opt-out request. The e-mail would acknowledge his intention to opt-out and ask the recipient to confirm his intention and his identity by a return e-mail message. This additional step will not unduly burden consumers and will almost certainly afford them greater privacy protection.

III. Conclusion

We thank the Commission for this opportunity to submit our comments on behalf of our membership. We are pleased to participate in a process that will ensure interests both the sender and recipient have been appropriately balanced. If you have any questions or concerns regarding these comments or any other aspects of the PMA, please feel free to contact us.

Respectfully submitted,

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